SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 2

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND AND JOSEPH H. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUMMARY BRIEF FOR PETITIONERS ON REARGUMENT.

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SUMMARY OF APPELLANTS' BRIEFS.

Since appellants have filed several briefs in this case, we will endeavor to give a brief summary of the material facts, and the questions of law involved, which we feel are necessary for the Court to consider in the final disposition of this case.

Procedure.

On August 10th, 1934, appellants filed their petition under Section 75 of the Bankruptcy Act (R. 1, 2). On

December 4th, 1934, the respondents rejected appellants' proposal for composition and extension of time (R. 8, 9). Thereupon, on December 19th, 1934, appellants amended their petition and proceeded under old 75s (R. 9 to 11).

On February 8th, 1935, appellants petitioned the court for an appraisal of all their property, and that they be allowed to retain possession under the provisions of 75s (R. 36, 37). This petition became a part of the amended petition. "Such farmer may at *the same time, or at the time of the first hearing,* petition the court that all of his property * * * be appraised * * * and be set aside to him and that he be allowed to retain possession under the supervision and control of the court, * * *" (75s). Upon this request the referee appointed appraisers on May 21st, 1935 (R. 15, 16).

On May 27th, 1935, the Supreme Court of the United States held old subsection 75s unconstitutional in the *Radford* case, 295 U. S. 555. On August 28th, 1935, the President signed and approved the new subsection 75s. On Sept. 30, 1935, appellants petitioned the District Court that *all* of the records, documents and proceedings had under old 75s be recalled from the referee and referred to the conciliation commissioner in accordance with the provisions of the new 75s (R. 16, 17).

On the same day, September 30th, 1935, the District Court ordered the referee in bankruptcy to transmit to the court *all records, documents* and proceedings in the matter of the estate of the appellant bankrupts, and ordered him to report all proceedings had before him as referee (R. 17, 18). On October 15th, 1935, the court issued its order formally transferring *all* of the *records, documents* and proceedings in the appellants' case to the conciliation commissioner (R. 19). *Among these records and documents was the above petition asking for an appraisal.*

Full Compliance.

This was a full compliance by appellants with the provisions of the new 75s. It was a reinstatement of appellants' case under the new 75s, together with *all records, documents* and proceedings theretofore had under old 75s. *It was a reinstatement—a resurrection of appellants' rights to save their farm and home for themselves and family under the direction of an Act of Congress.*

"(5) This act shall be held to apply to *all existing cases now pending in any Federal court;* under this act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, *shall be promptly reinstated* without any additional filing fee or charges." (New 75s.)

Appellants' case was pending. It was not dismissed. The District Court, the conciliation commissioner, the appellants and the respondents all treated and considered the transfer of all the records, documents and proceedings from the referee to the conciliation commissioner as a complete and full reinstatement of appellants' case under the new 75s.

Status of Bankrupts.

There is some question as to what was the status of appellants' case during the time that the old 75s was held unconstitutional and the enactment of the new 75s. They had asked to be adjudged bankrupts and were adjudged bankrupts under old 75s. They had not asked to be adjudged bankrupts under the general law, and being farmers could not be adjudged involuntary bankrupts under the general act. The District Court in its reinstatement of the case *treated the adjudication as of December 19th*, 1934, being the date of adjudication under old 75s (R. 19).

It is appellants' contention that when old 75s was held unconstitutional, they found themselves not only again under section 75 (a to r) but that as a matter of law they had always been under section 75 (a to r). This on the theory that when an act is held unconstitutional every step taken under it is a nullity. They had filed under section 75 (a to r) to begin with and their case *was never dismissed.*

It is true they had attempted to get under old 75s, but their endeavor failed when that subsection was held unconstitutional. There never was a legal old 75s, and appellants' attempt to amend their petition under old 75s became for the time being a useless act. *It took an act of Congress to give that proceeding life and vitality.* We submit that appellants were at that time, and until they were reinstated under new 75s, under section 75 (a to r).

Sole Jurisdiction.

From August 10th, 1934, the day that appellants filed their petition, and until they were reinstated under the new section 75s on September 30th, 1935, *all their property was under the sole jurisdiction of the Federal Court* under the provisions of section 75 (a to r). After they were reinstated they continued under the *sole jurisdiction* of the Federal court under new 75s. Any proceeding in any State courts after August 10th, 1934, *is and was absolutely void. Kalb* v. *Feuerstein,* 308 U. S. 433.

The District Judge's attempt to confirm a void foreclosure sale, by dissolving the restraining order against the sheriff on the grounds that the sale had been made prior to the order, *cannot change a void sale into a valid sale* (R. 48). The court could not breathe the breath of life into the nostrils *of a void sale—a sale that did not exist.*

Appellants' property as we have seen was under the sole jurisdiction of the Federal Court from August 10th, 1934, *and is still under that jurisdiction. The appellants' peti-*

tion has not yet been dismissed. They are still adjudged bankrupts. The sheriff's sales were held on *May 29th*, 1935, and on *August 26th*, 1935, respectively (R. 80). The appellants had *one year to redeem* under the Oregon law. But upon filing their petition on August 10th, 1934, the foreclosure proceeding begun *was stayed*, and the foreclosure proceeding started after that date *was prohibited* by section 75.

The lower court's inconsistency is seen when on August 31st, 1938, it issued a *Nunc Pro Tunc* order as of February 18, 1935, dissolving the injunction against the respondents on the grounds that appellants' proceeding was under section 75 of the bankruptcy act, subdivisions (a) to (r) inclusive, and that said section *is self executing* and *provides a stay of execution in the State courts*, and *that the restraining order was superfluous* (R. 74, 75).

Could Have Saved Time.

The lower court could have saved itself and this Court a lot of time if it had held *all the proceedings in the State court null and void.* If the Judge had done that he would have performed his duty under section 75. He would not have wrecked a home, and he would also have rendered a service to the respondents, *whether they know it or not. They then would have gotten their rental each year, and at the end of three years would have gotten their money, or the value of the property, and more than that they are not entitled to.* The District Court cannot *Nunc Pro Tunc* a void sale into a valid sale. *Gross* v. *Irving Trust Company*, 289 U. S. 432; *Bradford* v. *Fahey*, 76 F. (2d) 628 (C. C. A. 4th).

While we feel that the natural sequence, logic and reasoning of our position above cannot be successfully controverted, yet if this Court should hold that the foreclosure sales in the State court were valid, then we submit that

when appellants were reinstated under new subsection (s), on September 30th, 1935, *the period of redemption had not expired, and they were entitled to immediate possession and control of their property. Wright* v. *Union Central Life*, 304 U. S. 502. Section 75n, o, p and s, expressly provide that the farmer debtor shall be protected during the period of redemption, and that the period shall be extended for three years. State court proceedings were stayed, 75 (o). (See also *Kalb* case, *supra.*)

Res Adjudicata.

The question of *Res Adjudicata* is not in this case. It was not passed upon by the District Court, nor by the Circuit Court of Appeals. *These courts took jurisdiction and passed upon the merits*, however erroneous their decisions on the merits may have been. Therefore, that question *is not before this Court. It cannot be raised for the first time here. Sandusky* v. *National Bank*, 23 Wall. 289.

Anyway, there is no such thing as *Res Adjudicata* in a bankruptcy proceeding until the case has been finally closed, and the debtor either discharged or his petition dismissed. In the case at bar the appellants' petition is still in full force and effect in the lower court. *The jurisdiction in a bankruptcy proceeding is continuous. There are no terms in a court of bankruptcy. A bankruptcy court can correct its errors, or modify its orders*, at any time while the case is still pending.

> "It is true the bankruptcy court applies the doctrines of equity, *but the fact that such a court has no terms*, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended." *Wayne* v. *Owens-Illinois*, 300 U. S. 131.

> "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound

discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case on the merits; and even though it reaffirms its former action and refuses to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry." *Wayne* case, supra. See also *Gypsy* v. *Escoe*, 275 U. S. 498.

The District Court in its two orders of May 10th, 1938, which are the subject of this appeal, *did not base its decision on Res Adjudicata, but upon the merits* (R. 37, 38, 39). It made lengthy Findings of Fact (R. 64 to 74). It is true that its Findings of Fact and Conclusions of Law are inaccurate and erroneous, *yet the court reviewed the entire proceedings and passed upon the merits.*

Surely the respondents, *who not only did not object to this procedure, but in fact participated, and asked the court to quiet title in them of appellants' property, are in no position now to talk about Res Adjudicata.* The court obligingly quieted title in them, and they cannot now repudiate the court's erroneous decision. The court had jurisdiction of appellants' motion, as well as of their petition for review of the conciliation commissioner's action. The court passed upon the merits and the correctness of that decision in now before this Court.

Recall of Mandate.

Appellants' application to the Circuit Court to recall and correct the mandate, was made in time, and the Circuit Court erred when it denied the application. The application was made during the same term of court that it was issued. *The Circuit Court of Appeal's term ended October 1st*, 1939. *The motion to withhold the mandate was made November 4th* 1939, *and denied November 6th*, 1939. That is, the motion to withhold and correct the mandate and

the denial of that motion, *were both made after the old term ended and the new term began.*

Surely there could have been no final judgment prior to the disposition of that motion. It is also obvious that prior to October 23rd, 1939, there was and could have been no final judgment, because from July 10th until October 23rd, 1939, the case was pending before the Supreme Court of the United States upon a petition for certiorari. *This clearly brought us into the new term of the Circuit Court.*

The Supreme Court denied the petition for certiorari on October 23rd, 1939. On December 4th, 1939, it decided the *Bartels* case. 308 U. S. 180. In which case it disposed of the issues involved in appellants' case in favor of appellants. On January 2nd, 1940, it decided the Kelb case, *holding that foreclosure proceedings in the state court were void.* 308 U. S. 433. Thereupon appellants renewed their motion for recall and correction, which motion and petition was again denied by the Circuit Court of Appeals without opinion, March 22nd, 1940.

Thereupon appellants, on April 12th, 1940, renewed their petition before this Court for a writ of certiorari. *This petition was granted, and the writ issued on April 29th,* 1940.

This Court Retained Jurisdiction.

It is our contention that the Supreme Court of the United States did not lose its jurisdiction upon the denial of the first petition for certiorari on October 23rd, 1939. It had jurisdiction to correct and modify this decision, at least in the same term of court. This we maintain it did when it granted the writ upon the second petition, *which involved the same questions of law as the first petition, and was made in regard to the same subject matter. The Supreme Court not having lost jurisdiction, the Circuit Court, from which the appeal was taken, did not lose jurisdiction.* There was no

final judgment then—there is no final judgment now—there will be no final judgment until this Court disposes of the case upon this reargument.

Findings of Fact.

The Findings of Fact of a trial court will be presumed to be correct where there was a trial or hearing before the court, and where oral evidence was given, but not reported. But we maintain that the lower court cannot imagine or manufacture Findings of Fact where the record fairly shows *that there never was any oral testimony given before the court—where there never was a hearing or a trial before or in the presence of the court.*

The Court might also make Findings of Fact upon the review of a hearing had before the conciliation commissioner if the oral testimony has been reduced to writing by a reporter, and after it has been properly identified by the reporter. *But the court cannot base its findings legally* upon mere information as to what the testimony was by the conciliation commissioner, or the attorneys for the respondents. *That is not legal testimony,* and it is a dangerous procedure if such presumed testimony is given behind closed doors in the court's chambers.

The truth is that there never was any testimony, oral or otherwise given before the court, or to the conciliation commissioner to support some of the findings of fact made by the court. The only evidence that the court had before it was the argument of the attorneys, the petitions and applications of appellants, and the answers, petitions and applications of the respondents, and the records and documents, orders, petitions and applications set out in the record. *These we submit do not support some of the Findings of Fact upon which the court based some of its erroneous conclusions of law.*

There is nothing in the record that supports Findings number 11, 12, 13, 14, 20 and other findings that we consider immaterial. *We submit that the Findings of Fact must be supported by some evidence in the record.* This because no transcript of any of the evidence taken before the conciliation commissioner was ever made or submitted to the court, and no evidence in fact was ever given before the conciliation commissioner, other than in connection with the question whether or not the appellants were farmers, and *this was not reported or submitted to the court.*

Conclusion.

In conclusion we will state that Congress passed section 75 of the bankruptcy act for the very purpose of protecting the homes and farms of people like the appellants. That is the fixed and the determined policy of Congress as expressed in this act and other acts, and as repeatedly expressed in the House and Senate reports, and in the debates on the floor of the House and the Senate while this act was being considered and passed. Senate report 74th Congress, 1st session, number 985. Senate report, 76th Congress, 1st session, number 1045. House report, number 1808.

Yet for some strange reason appellants were prevented from taking advantage of an act of Congress. The respondents, *by their illegal foreclosure,* the conciliation commissioner, by *his one sided decisions,* and the District Court *by confirming the acts* of the commissioner, prevented the appellants from enjoying the benefits of section 75.

It is true that at times the court hesitated. On one occasion the court is reported to have told the attorneys, "The reason I called you gentlemen into the chambers is because it does not look well for the court to be arguing with attorneys from the bench. I have now made up my mind about the Frazier-Lemke Act. I have crossed the bridge, and I

am not going to turn back. I may be a stubborn darned fool, and then again I may not be. I am holding the Frazier-Lemke act constitutional. *Bernard is a farmer; his petition is in order; he is entitled to the benefits of the act. The proper thing in this case is an order putting the mortgage holder out of there,* but I haven't jurisdiction; jurisdiction in the first instance rests with the conciliation commissioner, *but if he does not act, or if he refuses to act, then I will act.*" (R. 148).

Not only did the conciliation commissioner not comply with appellants' request and appoint appraisers and protect them in their possession, but he appointed a trustee on September 19, 1936, thus depriving appellants of their property in violation of 75s4. (R. 23) "If at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, *a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer,* under the provisions of this act." (75s4)

On July 15th, 1936, appellants again petitioned the conciliation commissioner to oust the trustee and give possession of their lands back to them. (R. 19). They asked that they be given possession and that the estate be administered under the Frazier-Lemke Act. This also was denied them.

We shall not take up more time on this point. The printed record shows that *appellants were not negligent,* but endeavored again and again to have the conciliation commissioner, and the District Court give them the benefits of the Frazier-Lemke Act, *but they met with no success.* That is why we are in this Court, asking that the erroneous decisions of the District and Circuit Court of Appeals be reversed, and appellants be given an opportunity to proceed under section 75.

This summary brief is based upon the authorities and cases cited and arguments made in appellants' briefs heretofore submitted. We feel that this summary will aid the Court in setting together the various facts submitted in the printed record which facts we feel are poorly arranged and jumbled, and not put in their chronological order.

Respectfully submitted,

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